UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

LOCAL, 8027 AFT-NEW HAMPSHIRE, AFL-CIO, ET AL.,		
Plaintiffs.		
v.		No. 1:21-cv-1077-PB
		September 14, 2022
		1:00 p.m.
FRANK EDELBLUT, IN HIS OFFICIAL CAPACITY ONLY AS THE COMMISSIONER OF THE NEW HAMPSHIRE DEPARTMENT OF EDUCATION, ET AL.,		
Defendants.		

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE PAUL J. BARBADORO

APPEARANCES:

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P R O C E E D I N G S

THE CLERK: All rise for the Honorable Court. Please be seated.

This Court is in session and has for consideration hearings on Motions to Dismiss in civil matter 21-cv-1077-PB, Local 8027, et al. versus New Hampshire Department of Education Commissioner, et al.

THE COURT: All right. Welcome, everybody. It's a big courtroom. This is the first day I've had my courtroom restored to normalcy after two years of pandemic construction work in here. I actually can see the people who are going to be arguing in front of me, which is great, because part of the time I'm, like, looking around barriers to see if I can see the advocates when they're talking.

So, my thanks to everybody who has worked to put the courtroom back together today. This is a good a day for it, because there are some other people here, which usually is not the case.

So, let me lay out for you how I want to proceed. As the litigants know, there are two lawsuits here. One of the lawsuits asserts only a vagueness claim. The other lawsuit has two vagueness counts, a First Amendment count and another count that I don't think does anything that's really distinct.

The way I want to proceed is to address the vagueness claim first. I want to give the defendant an opportunity to

outline their argument with respect to vagueness. I note that one of the complaints includes two counts on vagueness. I will let you know that I don't construe those as setting forth distinct causes of action. Rather, I see them as asserting additional theories as to why the statute is vague.

So, when your turn comes you should feel free to argue either of those two counts on vagueness; and the Attorney General's Office, to the extent it wants to in its initial presentation, can present on that count as well. So, Count One in the first complaint and Count One and Two of the second complaint.

So, I'll hear the Attorney General's Office.

Perhaps it makes sense for whoever is going to advocate for the party that just has the one-count complaint to go next, unless you've internally arranged for a different order, and then have the other plaintiffs' counsel say anything they want to say to supplement. I'll give the Attorney General's Office a brief opportunity to reply.

People who know me know I also ask questions to people out of order, so just be ready for that.

And then we'll go into the First Amendment claim that is only asserted in one of the two actions. I'll hear the Attorney General's Office as to why that should be dismissed and hear the response from the other side. So, we'll go that way.

So, Counsel, you're up, and tell me why you believe the vagueness counts in the two complaints should be dismissed.

MR. GARLAND: Thank you, your Honor. I was planning to treat them together as well, so that's a helpful clarification.

So, under U.S. Supreme Court case law, First Circuit case law and case law this court has also applied frequently, the real threshold question or, really, the thrust of a vagueness claim is, when it's brought as a facial matter, is, is there no discernible standard of conduct in the statute.

THE COURT: Wow, you're going to start right up and get questioned really closely about that assertion.

MR. GARLAND: I anticipated I would be, your Honor.

THE COURT: You make that claim in your initial brief. The defendants respond and say, Whoa, you've forgotten Johnson and Dimaya in which the --

Folks can come in. Can we -- there's a bunch of people that want to come in.

THE CLERK: There is an overflow courtroom.

THE COURT: Oh. If there are not seats here, there is another courtroom where things will be broadcast.

THE CLERK: Courtroom 1.

THE COURT: But if you can find a seat, you're welcome to come and sit.

So, as I was saying, the defendants say you've

completely ignored more recent Supreme Court case law in Johnson and Dimaya which specifically rejects the theory on which you're basing your motion, and in your reply you don't even address that argument.

So, now is your chance. Tell me why you've left me in suspense as to why the plaintiffs are wrong in claiming that in Johnson and Dimaya the Supreme Court expressly said, This is not our test for vagueness challenges.

MR. GARLAND: Understood, your Honor. It was certainly not my intention to leave you in suspense.

But I think Johnson and Dimaya are kind of, my understanding of them is they are largely one-off cases that dealt with the categorical rule that was being challenged in those cases, and that subsequent to those cases this court, the First Circuit as well, has applied the general standard to vagueness challenges, facial vagueness challenges, that don't implicate criminal statutes or sentencing laws that have kind of that, the unique categorical approach --

THE COURT: Well, you're saying two things that I'm hearing: Johnson and Dimaya are one-off cases, they only apply to Johnson and Dimaya and nothing else, but then it seems like you're suggesting a categorical distinction between criminal and civil? Is that what you're saying?

MR. GARLAND: I'm not, your Honor. Forgive me. I may be misusing the term, but I was referencing the specific

provisions that Johnson and Dimaya concern which -- I'm forgetting the term of art for the sentencing and the felony -- forgive me.

I'm not trying to draw a categorical distinction, your Honor, no. But I do think when you're dealing with a statute that has civil application the First Circuit and this court have continued to apply the no-discernible-standard test. I think I would have to identify the specific --

THE COURT: I don't think -- I've searched, because you didn't give me anything in your brief. I can find no First Circuit case that squarely takes on the Johnson and Dimaya statements and concludes that, oh, those cases are limited to civil -- criminal, or those cases are limited to their facts. If you've got one, tell me which one I should look at, because I didn't find one of those.

MR. GARLAND: It may be true, your Honor, and I will defer to you, unless I can find one otherwise, that they haven't specifically conducted that analysis. I do believe, and I'm going to have to find a case for you, and so forgive me, and I'll certainly correct the record if I'm wrong about this, that the First Circuit has applied the general vagueness, the pre-Johnson and Dimaya vagueness test, and I'm certain that this Court has. I know that it's not binding on you, but Judge Laplante did recently in a case that both Attorney Bissonnette and I were --

THE COURT: I mean, I have unlimited respect for Judge Laplante, but this is not a court that has the ability to bind other judges. I have to make my own independent determination on that.

Okay. And I think you're aware that other courts have rejected the view that -- other Circuits have rejected the view that you're advancing, that that standard survives Johnson and Dimaya. Do you disagree with that?

MR. GARLAND: I don't dispute that, your Honor. I believe also that the D.C. Circuit has applied the previous standard post Johnson and Dimaya.

THE COURT: But without taking on the Johnson and Dimaya statement, yeah. The problem is -- I mean, let's go back and just revisit Johnson briefly. Johnson, as you know, is an opinion by Justice Scalia, who's always quite clear in what he says and what he means, and he specifically says, I'm quoting now:

In all events, although statements in some of our opinions could be read to suggest otherwise, our holdings squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's reach.

He then goes on to cite two prior Supreme Court cases for that proposition, and he says, These decisions refute any suggestion that the existence of some obviously risky crimes

establishes the residual clause's constitutionality.

I mean, that isn't a statement saying that Johnson and Dimaya are -- these are unique cases to which this standard doesn't apply but it applies to others. It simply says, Our prior holdings do not hold that something -- and, as the court goes on to explain, and this is the problem I'm having, I think you will agree with this, if that is the standard, then the only facial vagueness challenge that a court could ever sustain to a statute is to a statute that is incomprehensible in all of its possible applications. It's essentially a statute that is nonsensical, because, as the Court acknowledges, every statute is going to have some applications that will be not vague, and this statute has applications that would not be vague.

So, if you're right about the standard, I think you win. Maybe they can explain why I'm wrong about that. But I think you're wrong about the standard, so that's why you need to really defend this proposition, because I think, if you're right about it, it's hard for me to see how this statute is vague in all possible applications.

For example, if a teacher decided to put up White nationalist posters in her classroom and teach White nationalism, that White people are inherently superior to Black people, does anybody say it's unclear that that statute would prohibit that? I mean, it clearly prohibits that.

So, there are applications of the statute that would

be not vague. So, if you're right about the standard, it seems you win, but it seems like, to me, like you're wrong about the standard.

So, what would you like to say?

MR. GARLAND: Understood, your Honor. I think my response to that would be we had presented a particular legal argument in our motion, and we haven't briefed the other one, and I don't want to do that in an abstract sense, and I understand we received the invitation to do so and maybe missed the mark.

What I would say, though, is I do not read Johnson and Dimaya for the proposition that a law that can be read as a matter of statutory construction subject to guidance from the enforcing agencies in a way that is understandable, largely understandable, can be defeated by coming up with hypothetical examples where it's inapplicable.

THE COURT: I agree with you that -- so facial challenges like this one are much harder to establish than an as-applied challenge, and the plaintiffs have not elected to present me with an as-applied challenge, but that is a -- it would be much easier for the Court to look at a case in which a plaintiff seeks pre-enforcement review and says, I want to teach implicit bias, and this is how I teach implicit bias, and I can't tell whether the statute would subject me to losing my teaching credential if I taught it, and for that reason it's

unconstitutional as applied in this context.

The typical as-applied challenge is much easier for a court to address. A facial challenge, I agree with you the plaintiffs cannot win merely by positing kind of bizarre hypotheticals and saying it might be vague in that context.

One example that strikes me as kind of bizarre that is a fifth-grade teacher who explains to her students that, Well, you're not mature enough to drive; you have to develop maturity to reach a driving age. That would be a violation of the statute. That seems to be pretty far-fetched, and I don't think I need to take on every hypothetical that the plaintiffs could possibly think up because lawyers have unlimited creativity, and I'm not going to engage in 45 hypothetical situations.

But we have more than that here. We have some real significant issues, like implicit bias, which is something that is clearly of concern to the teachers here, to the administrators here, it was of concern to the -- obviously of concern to the drafters of the legislation, because they talk about unconscious bias. It was a concern to the drafters of the comments.

So, I think we have to -- we say, yes, I'm not going to address and resolve every hypothetical. A statute is not vague if it is vague in a single application that has no real bearing to the core issues that the statute addresses, but it

doesn't have to be vague in all applications if I follow the direction of Justice Scalia in Johnson and, I believe, Justice Kagan in Dimaya. And so, that's why I think the foundational principle on which your motion rests is at least concerning to me because of the argument that the plaintiffs present.

MR. GARLAND: Understood, your Honor. One additional point I'd make on that, and I'm happy to address some of what may be closer hypotheticals, is, I also don't read Johnson and Dimaya to contemplate that this is anything other than a legal issue, and so if the -- your criticism is well taken, and if you determine, You haven't presented me with the right argument, I can't grant your motion, I understand that, but I don't think it means that this case proceeds on into full-blown discovery. I think the question still is, is the text of this statute sufficient, and, though I would have to ask it with my tail between my legs, I think it's still something susceptible to briefing.

THE COURT: No, you should proceed with your argument. I'm just saying that's a theoretical, a foundational concern that I have that I've struggled with when I've tried to make sense of the argument. But you clearly maintain that argument for purposes of pressing your case, and you're entitled to develop it further if the case proceeds further. But I still have to decide whether the statute is unconstitutionally vague on its face, so I still have to engage in this.

So, let me ask you do you agree that cases like one of the cases you rely most heavily on, Hoffman, talk about factors that can affect a facial vagueness challenge? The Flipside case, Hoffman, do you remember that one?

MR. GARLAND: Yes, I do.

THE COURT: So, that case identifies things like, if a statute could be applied in ways that impinge upon First Amendment protected rights, that is more likely to be a statute that is going to be found unconstitutionally vague, right? Vague in all of its application standard doesn't apply in that context. Do you agree with that?

MR. GARLAND: I do agree with that, your Honor.

THE COURT: Do you also agree that that case says that whether a statute has a *scienter* requirement can be important in determining whether something is vague or not?

MR. GARLAND: I agree with that, your Honor, yes.

THE COURT: Okay. Do you agree that this statute, these statutes -- when I say "statute" I mean all of the sections in 354-A, the educational provision, in particular -- that none of those statutes have a *scienter* requirement attached to them?

MR. GARLAND: They don't have a -- yes, your Honor, I agree with that insofar as it doesn't say "knowing," it doesn't say "purposely," et cetera.

THE COURT: So, let's get to what -- I understand your

concern, because some of the plaintiffs' briefing is to, like, spin out 30 different hypotheticals, and some of them seem to me quite far-fetched, but I can let you know of my core concern. This statute doesn't have a *scienter* requirement attached to it, and it seems to me that the Attorney General's Office is asserting that the statute can be violated even if you don't expressly advocate a banned concept, if you advocate in a way that implies that a banned concept is true. Do you think the statute could be construed to be violated if an educator in teaching implies that a banned concept is true?

MR. GARLAND: That certainly is not my understanding of it, your Honor.

THE COURT: Okay. Let me show you what I'm concerned about here. So, your office, your boss, issued a formal AG's opinion interpreting the statute, right?

MR. GARLAND: Yes, your Honor.

THE COURT: Okay. And if we go and look at that provision, and we look specifically at the provision that discusses the sensitivity training safe harbor -- do you know what I'm talking about? It's at page 7 of 9.

MR. GARLAND: Yes. I'm familiar, your Honor, yes.

THE COURT: Okay. So, if we go halfway down the page I'll read the key portions of it slowly, just so you'll understand my concern.

"'Sensitivity training' includes implicit bias

training. Implicit bias training is premised on teaching people about biases they may have of which they are not consciously aware and helping them become aware of those biases so as to encourage treating others with dignity and respect and to avoid treating others less equally. Implicit bias training recognizes that biases develop over time through such means as personal experiences, messaging people may receive from media and other sources. Implicit bias training does not violate Section 297 unless it includes concepts of group superiority or inferiority based on inherent or innate group characteristics or concepts that an identified group should be treated unequally or discriminated against."

And then in the second paragraph it goes on to talk about the sensitivity training safe harbor in the statute, and what concerns me is the final couple of sentences in that paragraph. But if someone -- I guess I have to read the sentence above.

"For example, a public employer or government program may create a web-based resource entitled, 'Anti-Racist Resources,' and include information designed to promote a better understanding of racism and how to combat racism. But, if that web-based resource stated that it was designed to 'serve as a resource to white people' or to 'serve as a resource for our white employees,' then it could violate Section 297 because it may imply that White people

specifically, and for no other reason, are in need of anti-racist resources-resources that could benefit people from all backgrounds."

That suggests the Attorney General is saying to people, educators or people who offer sensitivity training, that if you do something that implies that a banned concept is true you could be subject to discipline for violating the statute. Now, the statute doesn't say that by its terms, but that's how the Attorney General interprets the statute, and that seems to broaden quite expansively, especially when you note that there's no *scienter* requirement. So, a person could unknowingly teach something that does not expressly advocate a banned concept but that could be understood to imply, even though they do it unknowingly, and they could be disciplined for violating the teacher ethics code.

That's where my core concern is. I think a lot of the things the plaintiffs say, lawyers do what lawyers do, but I think that is -- the core concern I have is, to the extent that the statute can be read and the Attorney General appears to read it to prohibit conduct that does not expressly advocate a banned concept, since there's no *scienter* requirement to the statute, that leaves educators in great doubt as to whether their conduct may comply or not.

That's my core concern. Please feel free to take whatever time you need to answer it.

MR. GARLAND: Absolutely, your Honor. I have a number of responses to that. I want to engage with it head on, but then also I have a couple of other points I'd like to make with respect to it.

The first is I do not understand, based on my representation to you as a Department of Justice official, that that statement is designed to expand the scope of the statute at all to a world where people who perceive or this subjective perception would be what governs the conduct. I think our view, as we've laid out hopefully fairly clearly in our briefing, and that the FAQs and the Attorney General's Opinion otherwise identified, is the affirmative act. It is the affirmative act of doing this. You use the word "advocate" I think as a fine way to put it. And so, to the extent that specific portion of this opinion --

THE COURT: Yeah, if you read the statute narrowly and literally, what it bans is -- I want to use the term "advocate" because different statutes use a different litany of things, but I think "advocating" is a good way to describe it, that something is, that something is not, that something should or should not be, and then it makes those statements about what that is or that should be or should not be, et cetera.

And if that's all and only what they did it's quite a very narrow statute, but if it could encompass within its sweep conduct that is unintentional but that is deemed by someone to

imply the advocacy of a concept, it becomes quite problematic.

That's where I'm concerned, and, since the Attorney General issues an official legal opinion in which he states that there can be violations by conduct that does not state but that implies, doesn't that give teachers good reason to fear that it might be applied in that way to them?

MR. GARLAND: Your point is well taken, your Honor. I do not understand that to have been the intent at all of this Opinion, and it certainly isn't the position I'm here advocating today.

THE COURT: I think what we do have to make clear today is not the day in which this issue would be necessarily resolved. If I were to grant your motion in its entirety, the case would be resolved. If I were to deny your motion, it would be only to say that this states a plausible claim that it is unconstitutionally vague, and it's possible that, as things develop, we would probably next revisit it on cross-motions for summary judgment after some limited discovery has occurred.

So, it doesn't necessarily follow. That's my concern. Whether you've addressed it sufficiently as to justify dismissal at the 12(b)(6) stage is one thing. If you haven't, we just go on to the next stage.

MR. GARLAND: Understood, your Honor, and I think I have two specific responses to that. They're related. The first one is we haven't presented this to you as largely a

legal question, there's no cross-motion seeking judgment on it, but we present it to you as a matter of statutory construction, and we've used our Guidance documents and the Attorney General's Opinion to put in front of you a construction that we believe survives a facial challenge as a matter of law.

But, as a federal judge or any other judge that's considering this, you are able to, it is certainly within your power to say, You know what? I agree with everything you said, but I don't agree with that statement. To the extent that statement could be read in the manner that you've expressed concern about, that creates problems and as a matter --

THE COURT: Well, we all agree that, I think we would all agree, that I do not have the power to rewrite the statute to save it, and I wouldn't try to do that. But I do agree with you to the extent that you're suggesting in order to address their vagueness challenge you have to construe the statute, right? And so what you're saying is, if you adopted a sufficiently narrow construction, then you wouldn't have the vagueness problem that you're raising.

MR. GARLAND: I think that's right, your Honor, and I think what you could very well do in a memorandum order would be to say, you know, I have acknowledged at oral argument or I brought up at oral argument that this particular provision in the AG's Guidance could create a problem as a matter of statutory construction, based on the verbs that are used in the

statute, consistent with the doctrine of constitutional avoidance, I reject that that is a plausible construction or is an appropriate construction because it creates issues that, frankly, judges don't create when they're construing statutes.

THE COURT: Right. But, again, we have to draw the line. A judge can't and shouldn't try to save a statute -- this isn't a constitutional avoidance kind of claim where I have some duty to construe the statute to try to save it. It's either vague or it isn't. I just have to say what it means. And I agree with you, if I said that it meant only conduct that expressly advocates and not anything by implication it would be a far narrower statute and probably of far less concern to the plaintiffs. But that's not what the statute says. I would have to give it that construction, and certainly I shouldn't disregard an official Attorney General opinion that construes the statute more broadly than I think it should be -- that I would have to think it's construed to adopt your argument here. See what I'm saying?

MR. GARLAND: I do, your Honor, but I do think it is within your power, and I believe there's a good deal of Supreme Court case law that supports the proposition that facial invalidation is strong medicine; that you aren't required to read it in a way that the language doesn't support, but, to the extent there are plausible readings one way or the other, you can elect the narrower one. You can also certify the question,

which we've raised the specter of, but I think ultimately it's well within your power sitting in this proceeding.

THE COURT: Yeah. The problem with me is that my construction would not be authoritative. It might be helpful for people to know what I think about it, but what ultimately matters is what the New Hampshire Supreme Court thinks about it. They have the final word on what the statute means, not me.

If you wanted to go on, I did have another question for you on a different topic, but do you have anything else you want to say in support of the vagueness argument? Of course, I'll give you a chance to reply after the other side's argument.

MR. GARLAND: I have two very relatively small points on what we were just discussing. The first is that I think the language of the statute itself does support the proposition -- this is really dealing with, as you term it, advocacy, and if you look at 193:40 it talks about the express belief in or support for, which I do think contemplates an affirmative act. It doesn't say "knowingly," it doesn't say "purposefully," and I acknowledge that, but I do think it contemplates some affirmative act, not some perception or inference from the act.

And so, I do think the construction you've identified that creates fewer problems, which I -- the construction I intended to advocate today is one that is supported by the

explicit statutory text, so I don't think you'd be rewriting the statute to adopt that in an order.

THE COURT: You say that I could -- I just want to be sure that I've got your position. You believe that I have the power to, and you would not object if I were to, construe that statute to say it only applies to advocacy written broadly to encompass all the various kinds of things that expressly advocates one of the banned concepts, and that it cannot be violated based on someone advocating a banned concept by implication; they have to do it expressly.

MR. GARLAND: Yes, your Honor, and I think that's consistent with 99 percent of the argument I've tried to make.

THE COURT: That would require me to reject that portion of the Attorney General's Opinion when he says something different from that.

MR. GARLAND: I understand, your Honor.

THE COURT: Okay. All right. So, what else do you have?

MR. GARLAND: The only other point I would make with respect to that portion of vagueness, your Honor, is that, to the extent there were some concern kind of around the margins, understanding you've identified Johnson and Dimaya as from a standard standpoint about whether implied conduct could violate it, I still am not sure that makes the statute facially vague. I think that's a question that could get resolved really

through an as-applied challenge, to the extent it were ever enforced in that manner.

And so, I disagree, and I've said today and I'm saying this explicitly, that it should get to inferred conduct or implied conduct, but, to the extent that were a concern, I'm not sure it's a concern that couldn't be sufficiently resolved on a case-by-case basis that would require you to reject the statute outright.

THE COURT: Yeah. The problem is what is the standard against which you identify when something crosses the line into implying, especially when there's no requirement for *scienter*. You can cross the line unknowingly and be subject to discipline. So, that's where you would want to have some kind of guidance as to when something is deemed to imply versus not imply something. That's, I think, the principal problem.

I doubt any of the plaintiffs are going to get up and say, I want permission to advocate one of the banned concepts expressly and literally. What they're concerned about is, I'm afraid in doing my ordinary teaching someone's going to haul me up on charges by implying that I've advocated a banned concept. I think that's got to be what their core concern is.

Maybe the plaintiffs have some -- they want to advocate specifically some banned concept, but it doesn't sound like that's what's taught in the schools to me, and so I'm not sure anybody is going to stand up and say, Well, that's what I

want to teach. They want to teach things that someone might argue by implication strays into a banned concept, such as -- you're well aware of what implicit bias training is like, and my understanding of implicit bias training is that it teaches that people are prone to stereotypical thinking, they're prone to in-group and out-group stereotyping, and that that can cause people to unconsciously treat people differently based on their race. Well, you say implicit bias training is fine, but when does it stray into something that is a banned concept if a banned concept can include everything that implies? So, that's my concern.

But let me ask you about -- I'd ask you, since you've asked me to interpret the statute, let me ask you to put on your statutory construction hat and construe the fourth banned concept for me, because that's the one that I have the most difficulty with. I've spent several days kind of parsing it and trying to think about what it means, and I'm interested in what you say it means.

So, you can pick any -- the banned concepts are the same in all of the statutes, I think, but if you want to take the education provision, the specific education provision, you can do that, if you want to do one of them, but just help me understand what you think the fourth concept discusses.

MR. GARLAND: Yes, your Honor. And I acknowledge that I believe in the Honeyfund case the judge identified really the

triple negative in a comparable Florida statute as creating a problem. How I would read it, and this is actually taken directly from part one of I think both sets of Frequently Asked Questions, is that advocacy that persons in one of the identified groups should not treat members of another -- other identified group equally. So, it isn't saying -- it's not advocating for a --

THE COURT: Well, let's separate -- it does two things. It says "cannot," and it says "should not," right? Let's focus on "cannot" first, because you can violate it by advocating that -- and I'll use -- for clarity sake I'll just focus on race, okay?

So, the fourth banned concept with respect to "cannot" says, as I'm understanding it, that people of one race cannot treat others without regard to their race, and that seems to be starting to implicate -- if we put in the words "can have difficulty in treating people," that sounds like the core of what implicit bias is. So, I wouldn't say that, at least the implicit bias training that I'm familiar with doesn't say that someone cannot do it, but they try to teach you about implicit bias so that you can become aware of the potential and hopefully avoid engaging in that kind of stereotypical thinking.

But that statute appears -- that provision, the fourth concept on "cannot" seems, if anything, to be even broader than

the second concept, because the second concept has a limiting term "inherently" in it. "Inherently" is important, because that is not my understanding of what implicit bias is. It's not an inherent characteristic of being White that produces implicit bias. So, the third concept at least has another limiting term in it, but that term is not in the fourth concept at all.

So, if it teaches that something cannot, a White person cannot treat a Black person equally and cannot may imply that they cannot because they're teaching that it often happens that they have difficulty in doing it, then someone who is trying to teach implicit bias the way it's supposed to be taught and the way, according to your Frequently Asked Questions, you want it to be taught, could still result in charges being brought against somebody. That's the concern.

MR. GARLAND: I understand the concern, your Honor. I think the race example is probably a good one, because my understanding, and the position that I'm here taking today, is this is basically -- I'm sure the Court is familiar with the concept of colorblindness, as kind of a -- that you shouldn't treat anybody differently because -- like you should functionally be blind to the race of a person. And my understanding of this provision is it's saying you can't tell someone they can't do that. That's it, that it's not requiring that somebody do anything beyond that, that it prohibits only

that sort of conduct, that this idea of this theory that --

THE COURT: All right. Students come into the classroom and ask the teacher, Can we talk about reparations as an issue? Can the teacher talk about reparations, talk about the thinking behind it, and if they were to advocate that reparations is a good thing, wouldn't that violate the fourth concept? And if they advocate -- even if they don't advocate, if they discuss the reparations movement in ways that could imply agreement with that concept, then they might violate it, right?

MR. GARLAND: I don't think so, your Honor. I think that that, frankly, has the prohibition backwards; that it's not prohibiting conversations where something raising conscious would be -- you know, affirmative action I think is another example.

THE COURT: Reparations -- doesn't reparations involve treating people differently because of their race?

MR. GARLAND: And I don't think this prohibits a discussion around that topic, your Honor.

THE COURT: It prohibits advocating that they should not be treated differently because of their race, doesn't it?

MR. GARLAND: I'm going to think about how you phrased that.

THE COURT: See, that you and I are having so much trouble even communicating about the fourth concept may tell us

something about the challenge. First, we're both lawyers, and we do statutory interpretation for a living, but if we're having this much trouble about it, do you think a person of ordinary intelligence looking at it with no special skills in the law could clearly discern what that provision means or doesn't mean?

MR. GARLAND: I understand the point you're making, your Honor. I do think the guidance we provided does provide that clarification. You may disagree, but I think it really is the idea that it's not prohibiting --

THE COURT: So, I appreciate your effort with Frequently Asked Questions, but those aren't regulations, those aren't law. That's just informal guidance that the issuer could withdraw at any time, disregard, change, without any consequence, really, right?

MR. GARLAND: Yes, your Honor.

THE COURT: Okay. So, that's different from a regulation. If an agency -- like if the Human Rights Commission issued regulations interpreting this provision, then arguably it would have some force of law if it was a permissible interpretation of an otherwise vague statute, but I can't really attach too, too much weight to the Frequently Asked Questions responses, because they don't have the force of law.

MR. GARLAND: You can certainly attach persuasive

value, your Honor, and I think there are a number of cases that, you know, if you were grappling between two plausible constructions, again, that's all you'd be able to do, and you say this one creates a problem and this one doesn't, I think you can turn to the Guidance to find that plausible construction, if you agree that it's plausible.

The other point I'd make with respect to this, and I don't want to go too far down this road, but I do want to make a point that we should have made in our briefing, and I apologize for not. There is a severance provision in the statute. So, they're asking for a strong remedy of striking down the entire law. They are not asking for any sort of targeted relief, but the law itself has one. We haven't briefed that.

THE COURT: Okay. So, fair point to this extent: I've been looking at the severance provision, but you did not argue that that -- you might have argued that, even if the first section is invalid, the second section survives, but the plaintiffs haven't had a chance at this stage to engage with you on that, and I would not grant, in part, dismissal at this stage, because the plaintiffs haven't had any chance to brief a specific argument about severance.

We may have to confront severance down the road later on, and you've perfectly preserved that argument for later, but I don't want the plaintiffs to feel that they have to respond

to something you throw out in oral argument like this, because that would be a very complicated set of briefing that would have to be used. The appropriate time to invoke that would be after I -- if I didn't dismiss the case in whole, to then, after appropriate briefing, hear argument about, Well, even if you didn't dismiss it entirely you should dismiss it in part, and then they would have a chance to engage.

So, you've preserved the issue, but I'm not going to take it up on the current motion.

MR. GARLAND: And I apologize. I wasn't advocating that, your Honor. We've moved to dismiss the case in its entirety, and that's what we've asked you for. And I do think, in light of the Frequently Asked Questions, which I do believe are a plausible basis to read the statute and resolve the ambiguity you're identifying, that provides a basis for the relief we're asking for.

THE COURT: Okay. Thank you. I appreciate it.

MR. GARLAND: Thank you.

THE COURT: So, let me hear from plaintiffs, whichever plaintiff wants to go first.

MR. MOERDLER: May it please the Court, my name is Charles Moerdler. I am from the firm of Stroock & Stroock & Lavan. I'm here with Peter Perroni, my colleagues David Kahne and Elizabeth Milburn, and we represent the AFT plaintiffs.

First, I would apologize to the Court if I sound a

little raspy and confused, but it's that time of year for colds.

THE COURT: That's fine. That's fine.

MR. MOERDLER: Your Honor, let me tell you, if I may, the areas I would like to touch upon --

THE COURT: Mm-hmm.

MR. MOERDLER: And the questions I would like to address, including each and every one of those that you put to my adversary, because they were as if you had read my outline in some --

THE COURT: Well, I read your brief.

MR. MOERDLER: That's it. Your Honor, let me, if I may, make two points at the outset.

The first is this is the third case in the District Courts passing upon these four bans. The first, of course, was Santa Cruz. Each of these bans *in haec verba* were in Santa Cruz. The second was Honeyfund, decided just a few weeks ago in the State of Florida, and, again, the same four bans, with one word difference. So that you have here potentially, potentially, an issue as to the weight that ought appropriately to be given to those decisions if *stare decisis* survives after recent decisions of another court. But, to the extent it does, then it is clear here that what must happen is some weight has to be given to them, and I'm sure the Court will do what it thinks appropriate.

THE COURT: To the extent it's persuasive. But we trial judges have busy dockets, and we do the best we can sitting alone, and we make our decisions, and I don't expect my colleagues to give much weight to what I do, and I tend to look at what other people do only to the extent it's persuasive. The Courts of Appeals have months to study issues, they have three-judge panels, so I tend to look more closely to Circuit and Supreme Court precedent.

MR. MOERDLER: I understand.

THE COURT: But I, of course, will read them and give them the weight they're due for their persuasiveness.

MR. MOERDLER: All right. The second point I wanted to make to you is a standard on this motion. This is simply a motion to dismiss. We did not seek a preliminary injunction for two reasons. The first reason, the most important one, is the issue here is of critical importance to the educational system of the United States, no ifs, no ands, no buts, no maybes; there are no reservations on that statement. Because of that, we believe a complete record is indispensable and can only be had by limited discovery followed either by a bench trial or summary judgment at which your Honor can have a full record to make a decision.

THE COURT: You probably spoke to Mr. Bissonnette at some point, since he's litigated in front of me on preliminary injunctions, and he also knows that I tend to be very cautious

about granting preliminary relief, and what I ordinarily do is let's have an accelerated discovery period and combine the preliminary and the permanent, because I don't like to make decisions on the fly without having a chance to think through them, and I don't like people coming to me and making dispositive arguments without them having a full opportunity to develop. So, I certainly grant preliminary relief on occasion, but on an important issue like this I would have insisted that we all take the time we need to think about it before we make any decisions.

MR. MOERDLER: Let me just, so that the record is complete for your Honor, call to your Honor's attention a First Circuit rule which I've not seen really repeated too much. It was in the Asociacion case decided in 2004. A dismissal on the pleadings will be upheld only if it appears beyond doubt that plaintiff cannot prove any set of facts in support of its claims which would entitle it to any relief. And against that background, the discussion that just preceded mine raises the question in direct proportion.

I wanted those preliminaries before I go to this issue.

THE COURT: Can I ask you, so I have put the case to your opponent that the foundational argument -- the foundation for his vagueness argument is based on a standard that the Supreme Court appears to have rejected in Johnson and Dimaya.

MR. MOERDLER: It's done it in three cases, your Honor.

THE COURT: Okay, so maybe three. I got two of them. But of the two or three where they rejected it, and I'm going to carefully consider what Mr. Garland said to me today about this, and there are other Circuit Court cases that have explored this issue that I will address, even though they weren't in the parties' briefing, but I would ask you, that standard -- and part of the reason why I doubt that that is the standard is because, in my view, that's a standard that, except in cases where constitutional conduct is implicated or the exact facts of Johnson, it would be impossible to bring a facial vagueness challenge, because every statute that I can think of that might be challenged on vagueness grounds has at least one application that's not vague, and this statute appears to have one or more applications that would not be vague.

Lawyers don't like to concede anything. Maybe you will refuse to do it, but would you agree that this statute has some applications that would not be vague such as --

MR. MOERDLER: Your Honor, I don't get to that point, if I may.

THE COURT: I know, but I'm entitled to ask you to get to that point.

MR. MOERDLER: You certainly are, and you're certainly

entitled to an answer from me. But, if I may, let me get first to what the basic -- the premise of the three cases is.

The third case was in 2019. It's a lengthy opinion by Judge Gorsuch, concurred in by six members of the Court. It's United States against Davis, reported at 139 Supreme Court 2319, and if I may read just one sentence from his opinion. I think it's only one.

When Congress passes a vague law, the role of the courts under our *Constitution* is not to fashion a new or clearer law *in haec verba* or otherwise.

THE COURT: I'm with you on that. I think Mr. Garland agrees.

MR. MOERDLER: But the problem is there are two ways of fashioning a newer and clearer law, and those who have clerked for the Court understands that. One is by rewriting it, and the other is by interpreting it, and so this case can very easily raise that question in full frame: Can you, by an interpretation that -- I'm going to prove that in terms of their interpretation of a section of this law, two sections, in fact, that you can actually rewrite the law through interpretation.

Let me give you an example, if I may. You search this law anywhere, and you do not see the words, *in haec verba* or otherwise, of it being extended beyond the classroom. To the contrary, the first few words of this statute are, A pupil in

any, any state --

THE COURT: Well, the Attorney General's Office agrees that it applies outside of the classroom.

MR. MOERDLER: And I say it does not.

THE COURT: They say it can be construed to cover conduct outside of the classroom.

MR. MOERDLER: And that's exactly where we come to part, because I don't believe, maybe I am wrong, that by construction you can turn "yes" into "no," "stop" into "go." The idea --

THE COURT: Where do you find the limiting language that would render the statute inapplicable to a coach, say, or coaching a football team in an away game and having communications with students there? What is there in the statute that you say makes it inapplicable to that conduct?

MR. MOERDLER: If I may, the first four words come right down to the point. Let me, if I may: "No pupil in any public school..." If it were written to be anything outside of the public school it would read, No public school pupil in this state shall be taught... That's the English language. Pause it again, if I may --

THE COURT: You mean physically on school grounds?

MR. MOERDLER: Correct. It's classroom.

THE COURT: Okay. There's certainly another way to read that term. I don't think that's the only way.

MR. MOERDLER: May come into vagueness.

THE COURT: Okay. That it could be read narrowly to apply only on school property?

MR. MOERDLER: No, no. I'm in the classroom. I'm even beyond the property. It's in the classroom. It's a classroom definition. Yes, maybe the hallways and maybe a study hall as in -- it is curriculum intended.

THE COURT: Well, if that's true -- I don't know if you're making the First Amendment argument.

MR. MOERDLER: No.

THE COURT: Whoever is making that will then have to deal with the argument that, Oh, if it's only limited to curricular work, that's very clear, Garcetti applies, it's government speech, the First Amendment doesn't apply.

So, whoever you delegate that task to, get ready because your colleague is telling me it only applies in the classroom, so it's only curricular and we all, you know, courts, multiple Circuits have said Garcetti applies, it's not First Amendment.

But you made your point. I understand it. So, why don't you go on with --

MR. MOERDLER: If I may, your Honor, I will deal with precisely that issue when I get to the First Amendment.

THE COURT: Okay. Go ahead.

MR. MOERDLER: But here I was trying to parse language

for a purpose, and I did not wish to give any offense in doing so. It was simply and solely to show that rewriting a statute doesn't mean adding or deleting words. It can be how it is interpreted.

Let me give you one that's a little clearer. All right?

There is nothing in here that says extracurricular activities are covered, and yet the opinion of the Attorney General says that. Now, let me go to that point, because it becomes very important.

Johnny is on the swimming team. Johnny is swimming. He comes out of the pool and a teacher -- let's make it even more ridiculous -- a teacher, not his own, he sees and says, Hey, by the way, did you see the story on the Ukraine? What's the story between the Russians being oppressive and anti-human in oppressing the Ukrainians? Now you have the superiority clause of the statute coming into play. If it were done in the courtroom, I mean, in the schoolhouse you're within the words of the statute, but is it intended to be there? I think not. And if one reads --

THE COURT: You're giving heavy weight to the word "in," right?

MR. MOERDLER: Yes.

THE COURT: And you say it can only be read one way, and that means physically on the school grounds. But the issue

you raise seems to me to have greater potency when talking about First Amendment, because, even if Garcetti applies, Garcetti doesn't apply to every word that a teacher could speak to a pupil, and so if they run into the pupil at the grocery store with their parent and say something, that is unlikely to be deemed not First Amendment speech. So, it does have bearing on that issue, but I don't think it's of central importance to the particular vagueness argument we're discussing now.

MR. MOERDLER: Let me, then, deal with the second part of the presentation in that regard. The focus has been on this being a facial challenge. At the time the complaint was filed, both complaints, neither of us had any particular documents that would tell us what the position of the State was, what the position of the public was, et cetera. Let me pause on that sentence.

With respect, I do not believe that I, the lawyer who has gone to law school for the purpose of understanding the law, am the right person whose interpretation should at the end of the day carry how it is to be construed, vaguely or otherwise, as contrasted with the ordinary public. In about two minutes I will show you that since the complaint was filed we now have a beginning of a peek as to how the ordinary public regards it and thereby underscoring the absolute need for discovery and the absolute need for understanding our point in our brief that this is also as applied.

THE COURT: I'm less interested, frankly, in how the public, what they may deem a violation of the statute. I'm very interested in what the people who enforce the statute say. And so, if you've got -- has the Human Rights Commission passed on this? Has a court passed on this? Has the Department of Education -- you in one of your complaints note that one of the named plaintiffs had someone complain about the fact that they signed a petition. Now, you and I know, and I doubt Mr. Garland would disagree, that that conduct is constitutionally protected, it is not conduct for which they can be disciplined under the statute, and it is completely unreasonable to suggest otherwise.

You would agree with that, right, Mr. Garland?

MR. GARLAND: Absolutely, your Honor.

THE COURT: So, that some person thinks that that's complainable under the statute doesn't really tell me anything. What matters is the people who actually have to enforce the statute.

MR. MOERDLER: But you cannot leave without weight the chilling effect that it has on any human being. For example, if Johnny asks the teacher a question, What is implicit bias?, and the teacher has seconds to answer that question, clearly the statute will have, certainly on all the publicity it's attracted, some significant effect on the teacher being able to respond, being able to deal with it and deal with learning.

And the complaint calls attention to the fact that there have been those instances already where teachers feel that they cannot teach adequately.

Can I respond to a question, What was Brown against the Board of Education?, or am I violating the statute?

THE COURT: With respect to you folks, I understand your lawyers have to advocate, but some of that stuff seems to me to be completely farfetched. No teacher could be subject to discipline under the statute for talking about Brown v. Board of Education. I think I've identified what my core concern is. Maybe you have others.

But the problem is not that they won't be able to talk about the Civil Rights Movement or something like that. The problem is that, to the extent they engage in conduct that could be understood by somebody other than them to imply advocacy of one of the banned concepts, that they could be subject to dismissal for conduct that they don't intend to engage in that they can't know by reading the statute is clearly barred, that's where it starts to have problems.

MR. MOERDLER: And so, let me take what you have just said and take it to one step further as to the problem.

By statute in this state the teachers are required to teach how bias came into being, intolerance, discrimination and the like. What it was by statute and how can we prevent it, that in and of itself is a direct conflict with the statute.

And to make that point, because you obviously frequently are called upon to resolve conflicting statutes, let me point out to you that as recently as July of this year that mandate was expanded as to what they have to teach. Now put myself in the position. Can I teach and comply with the statute; can I not teach and comply with the other statute?

THE COURT: Again, let's go back to some of my threshold concerns, because, to the extent I have a concern --

MR. MOERDLER: All right.

THE COURT: -- it's really a good idea for you to try to address my concerns.

MR. MOERDLER: I agree.

THE COURT: Okay. So, I come back to the standard, the standard about vague in all of its applications. Do you agree that this statute is not vague in all of its applications, and, if you don't agree with that, how do you answer my hypothetical, which it seems to me to be clear and not vague that you can't advocate White supremacy in the classroom without violating the statute? If you disagree with that and say, Oh, no, somebody could advocate White supremacy and not violate the statute, show me how that's so. Put on your statutory construction hat and tell me how -- but if you agree with me, just tell me first. Do you agree or not --

MR. MOERDLER: I do not totally agree.

THE COURT: -- that if the statute is vague -- that if

the standard is vague in all of its applications then the vagueness claim fails?

MR. MOERDLER: No. It's the exact opposite. If it's vague in all of its applications, it falls.

THE COURT: No.

MR. MOERDLER: And if it's vague in some it falls. That's what Johnson precisely says.

THE COURT: Okay. Well, you won't answer it. That's okay. You want to move on to the next point?

MR. MOERDLER: Well, I'd like to answer the balance of that, Judge. I'm going to make the assumption that the theory is that, if it's vague in all of its applications or if it's not vague in all of its applications, again I have to say to you what do you tell the teacher when the statute says you must teach precisely the subject you're barred?

THE COURT: If the statute requires you to teach something that you're barred from teaching, that would be a problem.

MR. MOERDLER: That's the point I'm making. That was the point I was making.

THE COURT: I understand. All right. What else have you got?

MR. MOERDLER: All right. Your Honor, let me, if I may, talk to you about the second aspect of the statute that has not been touched upon today, and that is enforcement. The

statute in plain and precise terms, in terms of its application by the Supreme Court and by all of the courts, focuses very heavily on enforcement. If you do not have guardrails that limit how it can be enforced, why it can be enforced, when it can be enforced and what can be enforced, according to two United States Supreme Court cases -- pardon me -- three, according to all of them a law must be sufficiently explicit, but it must be stated in such terms and with sufficient guardrails as to limit arbitrary and discriminatory enforcement. And that is Kolender against Lawson and City of Chicago against Morales decided in 1999.

And in cases subsequent to those in the Circuits that has been a major element, more so than the language, because, as I believe it was Justice Kagan recently pointed out, it is not in our province to leave to the policeman one interpretation of the law and leave to the judge another. It is our requirement that they both look at it and know what they can enforce and how. Most of the time this has come up in the loitering context or in the reliable identification --

THE COURT: I get it. That's one of the important considerations in the vagueness doctrine, is you want to have a law that gives fair notice and then a law that is not prone to selective enforcement left entirely to the unfettered discretion of the enforcer. I'm well aware of those concepts.

MR. MOERDLER: Let me, then, go back to adding a third

piece to this, which your Honor touched on in another context, and that is three Supreme Court cases.

THE COURT: Can I just stop you, though?

Mr. Garland, on remedy you made an assertion, and I may have misinterpreted you, but I think the plaintiffs disagree with, that is, you seem to say this statute disallows a complaint to the Department of Education until someone has complied with the Human Rights Commission review process. Are you making that claim?

MR. GARLAND: So, your Honor, in reading my reply we may have overstated, and I apologize for that, and I would certainly retract the statement that it is required by the statute to operate that way. I can tell you it is operating that way. The Department of Education is not proceeding with anything until the Human Rights Commission has passed on the conduct --

THE COURT: Because I have looked at your regulations on the Department of Education, and I do not see anything in those regulations that permits the Department of Education to refuse to entertain a teacher misconduct allegation simply because the person making the complaint has not first gone to the Human Rights Commission.

So, are you saying that the Department of Education as a matter of practice is simply declining to consider any allegation that these statutes are being violated by any

teacher until and unless that person making the complaint has gone to the Human Rights Commission?

MR. GARLAND: Your Honor, as a matter of practice, yes, that's what's happening.

THE COURT: But you understand that only aggrieved people can go to the Human Rights Commission. So, if you're just a citizen who has read about Ms. Smith teaching prohibited concepts in the school and you want to complain, you can make a complaint to the Department of Education, but you're not an aggrieved person under 354-A who has standing to bring suit. The New Hampshire Supreme Court has rejected that in other contexts. You're not an aggrieved person. You can't sue because you've read in the newspaper that Ms. Smith is teaching prohibited concepts. You can complain to the Department of Education, but you can't sue.

And you're telling me the Department of Education simply would not consider that kind of complaint?

MR. GARLAND: I'm telling you -- no, certainly the Department of Education can receive those complaints. It won't act as a matter of investigative and enforcement authority until the HRC --

THE COURT: That's a matters of their discretionary judgment, not that the statute requires it.

MR. GARLAND: Your Honor, yes. May I make one more point?

THE COURT: Yes.

MR. GARLAND: That is how as a matter of practice, candidly to the Court, it is operating. I don't think it's crucial to the vagueness, resolving the --

THE COURT: I don't think it's crucial, but I did think you had over-claimed the actual process, so I wanted to clarify it.

MR. GARLAND: I apologize for that.

THE COURT: No. No apology needed.

Counsel, go ahead.

MR. MOERDLER: Your Honor, I must respectfully point out that the Attorney General is misinformed. I am now going to tell you that we were able to look behind the curtain and get our first piece of information, and it's in this record that shows they do investigate them, they do comment on them.

THE COURT: Why don't you show me the exhibit number so I can look at it.

MR. MOERDLER: Here it is (indicating).

THE COURT: Okay. What exhibit?

MR. MOERDLER: It is -- the Department of Education's own website has on it a report, an op-ed article by the Commissioner, and in that article he refers to a bunch of documents that he has attached to it. So, you go behind that and you look at the documents, and they are 72 pages in number. The first one is a quiz that discusses how teachers -- pardon

me -- how people --

THE COURT: Just for the record -- Counsel, you guys know where in the record it is?

MR. MOERDLER: It's an exhibit.

MR. KAHNE: Exhibit B.

THE COURT: Exhibit B to?

MR. KAHNE: To the joint memorandum.

THE COURT: The joint memorandum. Okay.

MR. KAHNE: It's ECF 45-1.

THE COURT: So, the other side has this?

MR. KAHNE: Yes.

MR. GARLAND: I do, your Honor.

THE COURT: All right. Good. Thank you.

MR. MOERDLER: It discusses -- this is a quiz. It's a survey or a quiz: "U.S. Census data shows that African-American and Latina women earn how much more (sic) for every dollar that a White man earns?" And then they give them a whole bunch of choices.

"Identify the source of this quote: We have deluded ourselves into believing the myth that capitalism grew and prospered out of the protestant ethic of hard work and sacrifices. Capitalism was built on the exploitation of black slaves and continues to thrive on the exploitation of the poor, both black and white, both here and abroad." And then it says who is the author, and it gives you names.

It goes on and on in these veins for four pages of those kind of questions, touching upon implicit bias and every other thing that you've talked about so far.

Then it attaches a confidential report of the Chief Investigator of the Department of Education named Mr. Richard Farrell, dated April 22 -- 2022. Now, understand that's long after the complaint, and that's what we thought was going to be found, and we thought that it would show what they were doing and how they were doing it. And this is only one that we have found so far that the State put on a website, a state-funded website, and let me read to you a beginning of that.

Good morning, Rich. We've had an opportunity to review the material that you sent, that includes those questionnaires, and have the following information for you in response to your inquiry: First and foremost, the activities identified are from the Human Relations Course at, redacted school name. After review with the principal, curriculum coordinator and assistant superintendent, we have determined that these activities do fall within the scope of the course.

And, For your information, we have attached a copy of the syllabus. You'll also notice that this syllabus includes a form for parental notification as well as an invitation for parents to review class assignments...

And it goes on and on and then concludes with the following statement:

Should any further such objections be received the District will handle them in accordance with our policy, IGE -- I have no idea what that one is.

THE COURT: Are you reading this to me because you want me to assume that they are investigating?

MR. MOERDLER: They say so.

THE COURT: Okay. Do you agree that that's evidence that they're investigating?

MR. GARLAND: Your Honor, I don't. I would ask that you take a look at it.

THE COURT: I can't absorb something he read to me. I'll have to read it. I'm going to take a break in a minute, but I want to -- is the other side, the other plaintiff presenting any vagueness argument, or are you just going to rest on theirs?

MR. BISSONNETTE: Yes, your Honor.

THE COURT: Okay. So, I'll give you, Counsel, another ten minutes, and then I'm going to give the other side an opportunity to argue vagueness, and then I will a take a break.

MR. MOERDLER: Your Honor, I'm going to truncate it so that you do not -- but I want you to know it concludes with a statement: We have reviewed this material through the lens of the Divisive Concepts law.

Now, this was a report to the Chief Investigator, who then sends it on to the Commissioner of Education and asks him

to review what to do. If that isn't an investigation, I don't know what is.

THE COURT: Okay. Good.

MR. MOERDLER: All right. Now, I have two other points I'd like to make to you on enforcement. It starts, I believe, with an FAQ in the Guidelines, because I do want to focus on the Guidelines briefly.

The Guidelines pertaining in Exhibit 19 state in FAQ Number 8: Does this law apply to all activities or just teaching? And it answers that question as follows: The prohibitions apply to all school activities carried out by the public in their role as public schools, including those that are part of the public school's work.

This foundational confusion caused the result that you mentioned earlier of four teachers being the subject of a complaint, having signed a petition outside of the school. It is the one that Mr. Bissonnette will address in connection with another one of these document revelations and why we have said to you from the outset and believe most sincerely this case cries out for discovery of the documents behind it.

The history of this, and that's why I wanted to mention this, when you have the author of the bill, when you have the Chairman of the Committee both stating its purpose was to address issues that involve CTR and a whole bunch of other things that are disguised behind the background of this, that

it was the purpose of it, that we will end it by this statute, tells you where they're going. And then, when you see the Commissioner direct that path by putting on his website right next to this kind of a report the complaint form so that people can complain to him or to the Human Rights Commission, with respect, enforcement is, at the very least, vague and unclear.

Mr. Garland, a highly respected, totally principled lawyer, says to you in a brief, We have a protocol as to how it's to be enforced. There is no protocol that we have seen. They may have had conversations, but, if they have, the Department of Education is investigating them every day; and, as Mr. Bissonnette will show you, he has written to Human Rights to find out what they've turned down, and Human Rights won't even answer him, even though the law explicitly directs it, allows it to put out all of the complaints to dismiss.

Your Honor, there is much more I could say, but there's only one thing that I think I would like to stress again, and, in doing so, let me make a point. I say it not to give any kind of controversial aspect to it.

This statute has a counterpart which one cannot forget either in the First Amendment context but here now in this context. The other statute, 189:11, is what an explicit statute does. It says -- and, by the way, these same kind of words were used in the July guidance from the Department of Education. They are how intolerance, bigotry, et cetera have

evolved in the past, can evolve, and how do you prevent it under the statute as construed by the Guidance, assuming that the Guidance has weight, and we will need not press that beyond the briefs, because it's laid out there. But how do you possibly say I can prevent all forms of bias by the following course of action, whether it be training, education or the like, in order to comply with 189:11 without immediately violating the precise language of 193?

And I thank the Court for its courtesy.

THE COURT: All right. Thank you. Let me ask my reporter.

(The Court conferred with the court reporter)

THE COURT: Mr. Bissonnette, go ahead.

MR. BISSONNETTE: Thank you, your Honor.

THE COURT: So, let me ask you the same question I asked your counterpart to see if you are willing to give me an unequivocal answer on it.

MR. BISSONNETTE: Yes, your Honor.

THE COURT: I've explained my concerns about the standard that the State's brief is based on, the vagueness in all respects, all-applications test, but if that test applies, it would seem that this statute is not vague under that test, because there is at least one application on which it's not vague, and I've pointed to what I think is a pretty clear application, I can't imagine any of your clients would disagree

with this, that it's a problem if a teacher tries to promote White supremacy as a part of their curriculum, and that would violate the statute, and that's a clear violation, and if vagueness, facial vagueness and its challenges fail unless it's vague in all applications, then it would appear this case would -- I'm not going to force you to make that concession, but if you're not willing to make it, just give me some kind of understanding of why I might be misguided.

MR. BISSONNETTE: Your Honor, I see exactly where you're going with this, and I completely understand. I think there probably is one application of the statute in which it would not be vaguely applied, and that is if a teacher said, and I'm looking at Banned Concept 1, a White person is inherently superior or inferior to some other category. That is really probably the only application, a literal textual application of the statute in which perhaps this statute could -- is not --

THE COURT: I raise this with you, because it points out the problem with this standard of vagueness. The vague in all application standard eviscerates facial challenges. Now, maybe as a matter of policy the Court will want to do that, because Justice Thomas, for example, continues to say that's the right standard, and what that really means is only incomprehensible statutes can be challenged on their face; and there still will be opportunities to challenge on vagueness

grounds, but it is only in applied challenges, which you haven't brought.

MR. BISSONNETTE: Well, two points I would like to make on that. So, obviously, to echo some of the prior argument that you heard this afternoon, the standard is not the standard, in our view, that the State has proffered in this particular case. It is not in all its applications. The Johnson versus United States, the United States case, squarely addresses -- Honeyfund, in fact, tangentially addresses it, where that court says defendants may be right that some of the prohibited concepts are not vague, but some certainly are, and then presume to enjoin, preliminarily enjoin the statute in its entirety. And I think that is, frankly, the same analysis here, assuming we were even asking this Court today to enjoin the statute, which we are not. We are asking this Court simply for the opportunity to proceed to discovery on some discrete things that I would like to explain to this Court why we think it's essential.

As to your question, though, about are you making an as-applied challenge in this case, we are, and I want to explain the contours of that as-applied challenge. So, setting aside that we believe certainly at this pleading stage that we meet the standard for a facial challenge, our as-applied challenge particularly applies to educators with respect to the unique enforcement regime that applies to them that actually

doesn't apply, necessarily, to other public officials.

THE COURT: Well, in a typical as-applied enforcement challenge, and you may have brought these in front of me, certainly others have, I have held that a pre-enforcement challenge can be ripe in certain circumstances, and it typically involves someone who has a real threat of having some serious consequence apply to them. They made clear to the Court, This is what I want to do, and this is why I have a legitimate fear that this is going to happen to me if I do it, and I need you to tell me whether this statute is unconstitutionally vague as applied so that I can do it without fear of losing my teaching license. That's a typical as-applied challenge.

You say you presented that here? I didn't see it in your complaint.

MR. BISSONNETTE: Yes. The complaint that the Mejia, Philibotte and NEA plaintiffs have brought have said that this is a facial and as-applied challenge.

THE COURT: They use the word.

MR. BISSONNETTE: And I understand that, and in responding to the critique of the State that, Hey, you're only bringing a facial challenge, we finesse that with a little bit more clarity, wanting to explain that, unlike the types of cases that you're kind of referring to here, our as-applied challenge here is focusing on the unique application to

educators, not from a text perspective that you're referring to here, I have a fear that this is going to be applied to me because I want to teach a certain book, but because of the unique prospect for arbitrary or discriminatory enforcement that apply to teachers in particular, and that is because of the issue that you just flagged just a few minutes ago, which is the fact that the Department of Education has unique and inherent enforcement power under this particular statute.

Setting aside the lack of a *scienter* requirement, setting aside the fact that there's also a duty-to-report obligation that exists within the Department of Education rules, the department of obligation (sic) is obligated to take up any complaint that comes to its office. The department of obligation (sic) is obligated to investigate, and the Department of Education is obligated to take action if it believes that a violation has occurred.

So, again, the chief ambiguity problem in this case as applies to teachers and more broadly, to some extent, is the fact that you have vague terms. But it's not just vague terms; it's combined with the prospect of the career death penalty for educators, and I don't mean that to be hyperbolic.

THE COURT: I agree with you that that's highly relevant to the vagueness challenge. The Supreme Court has made clear that vagueness challenges can be brought to civil statutes, but I think, and Justice Gorsuch in his concurring

opinion in Dimaya and perhaps in the majority opinion your colleague referenced, has suggested that there shouldn't be any different standard from a criminal to a civil vagueness challenge, but I think it continues to matter what kind of vagueness challenge. If you have a regulation that applies, an economic regulation to big business, such as the Sherman Antitrust Act, that bars unreasonable restraints and trade, that sounds on the surface really, really vague, but it is not unconstitutionally vague.

MR. BISSONNETTE: Sure.

THE COURT: Businesses can plan and can do their research, but where individual teachers face career death if they're deemed to be in violation of this provision, not just loss of job but loss of certification, that is a very severe consequence that makes it much more like a criminal statute that should justify a higher level of review on terms of vagueness. I think that's the most important point to make, that the teacher statute is different from the other provisions which don't apply potentially to educators directly; they apply to government programs.

MR. BISSONNETTE: Yes.

THE COURT: And those statutes, to the extent they're applied outside of the educator context, are arguably less concerning. It's the attempt to threaten the livelihoods of offending teachers that is the particular problem.

MR. BISSONNETTE: Absolutely, your Honor, and I think that the standard on vagueness is critical here. And not only, your Honor, did you highlight the lack of a *scienter* requirement and how the Hoffman case, in particular, says, Gosh, if you don't have a *scienter* requirement we need to be really careful here and really conscious of --

THE COURT: I referenced that one, because that's one that the AG's Office relies on.

MR. BISSONNETTE: Absolutely. But Hoffman actually says something else that I think is material and where the career death penalty kind of component comes in here. The court there also essentially says that the seriousness of the penalty is a consideration, and that's the issue that we have here in the Sessions case, the case that we've been referring to. There you didn't have a criminal penalty, necessarily, you had a criminal statute but with civil deportation consequences, and what the Supreme Court there says is, Oh, boy that is such a severe penalty that we need to engage in a more robust vagueness analysis.

The same is true here. We have a statute that lacks a *scienter* requirement, we have a statute with drastic career ramifications, pursuant to a regime where the DOE is obligated to take action and respond to every complaint that goes through its office.

And this is why, your Honor, I think the order of

operations piece I don't want to gloss over. I actually think it's incredibly important in this case. You have the Department of -- much respect for Department of Justice, by the way. I litigate against them all the time, and they do a great job, but they have represented publicly in pleadings before this Court, Don't worry about this, don't worry about the unique Department of Education enforcement capability of the statute, because we have essentially manufactured a regime where they don't look at it, even though that regime conflicts with the very regulations that the Department of Education is obligated to --

THE COURT: Just to save time, I wanted to clarify that the State was over-claiming the way that regime worked, but the way it actually works I don't attach significance to it from the government's perspective, because it's essentially at the sufferance of the head of the Education Department. To the extent you don't want to do that anymore, you just stop. So, even if they have some unofficial practice of not entertaining anything, they could change that any time they wanted. They just could decide, Well, today we're doing it differently.

MR. BISSONNETTE: I think that's right. At the statute's core, your Honor, and I'll close the loop on enforcement and arbitrary enforcement, which is an independent component of vagueness, is that you really have five bodies that can adjudicate complaints under the statute. You have the

Department of Education, Department of Labor, Department of Justice, Human Rights Commission, and independent of that Superior Court, the State Super Court. So, to me, again, all of this highlights --

THE COURT: Am I correct in assuming, so that we don't overstate this, that individual educators, the only enforcement that they experience directly is at the Department of Education complaint level? They can't be sued individually in the Human Rights Commission.

MR. BISSONNETTE: No.

THE COURT: They can't be sued in Super Court individually. They can't get damages awarded against them. You think they can.

MR. BISSONNETTE: Absolutely, your Honor.

THE COURT: Tell me how that is so.

Do you disagree with that?

MR. GARLAND: I disagree, your Honor.

THE COURT: Yeah, okay.

MR. BISSONNETTE: I have never, frankly, heard that position from the Department of Justice.

THE COURT: I'll explain to you why. So, the Human Rights Commission -- there's a Supreme Court, New Hampshire Supreme Court case, the case is Cooper against -- no, I don't have it in front of me. I'll find it at the break.

There is a New Hampshire Supreme Court case that

defines what an aggrieved person is, and so that limits who can bring the claim, and then there's nothing in the statute that allows for liability for a Human Rights Commission violation against an individual teacher. It's a liability against the school district that you can bring. If I've got that wrong, you'll let me know.

So, the case about whether you can be -- thank you. I thank my clerk for bringing it to my attention.

The case in which the Supreme Court has defined what an aggrieved party is for purposes of 354-A is State versus Hynes, 159 New Hampshire at 187. Oh, wait a minute. I'm sorry. I've got the wrong case here. Let me check.

(Pause)

THE COURT: This is the case, yeah, State against Hynes, 159 New Hampshire 187.

But then I turn to the -- where in the language of the statute, we'll call it the banned concept statute, does it say a Human Rights Commission complaint can be brought against an individual teacher?

MR. BISSONNETTE: Well, the statute says that, you know, all rights and remedies that exist under the Human Rights Commission statute apply in this particular instance. I'm going to look at your case to make sure I don't want to overstate the law.

But here is one potential concern: Even if -- sorry.

THE COURT: You don't litigate in this area, but I've spent a lifetime dealing with employment discrimination cases, and, in fact, until the New Hampshire Supreme Court decided the Fuller case, the Fuller Ford case, the Federal Court here recognized you couldn't bring claims against individual people under 354-A, and the New Hampshire Supreme Court disagreed with that in one of my cases that I certified to them, that's the Fuller case, and said those individuals can be liable under an aiding and abetting theory, which is in the statute, but the aiding and abetting theory doesn't apply to this particular provision.

So, I do not think at least -- I do not see anything in 354-A that allows a claim to be maintained against an individual teacher, and the statute itself talks about -- the education statute says you can bring a claim against a school district but not the teacher in the Human Rights Commission. So, I don't know how you could possibly get relief against an individual teacher except through a Department of Education complaint. I don't diminish that, I think that's hugely significant, but your briefing suggested that it could, and I'm just not sure how that's so.

MR. BISSONNETTE: Sure. The guidance itself, the July FAQ guidance, basically makes clear that, if you think there is a violation, you could file a complaint with the Human Rights Commission. You can file a complaint --

THE COURT: Against the school district, yes, you can.

MR. BISSONNETTE: And the department of -- well, the Human Rights Commission. You could file a lawsuit with the Human Rights Commission. You could file a lawsuit in court.

But, regardless of who the defendant is, I actually think, to get really practical here, because I think being practical here is really important, the teacher becomes the subject of that complaint regardless of who the defendant is. Let's say the defendant is the school district. The school district gets sued because of how a teacher behaved. The teacher is getting wrapped up into that litigation.

THE COURT: I agree with that.

MR. BISSONNETTE: And so, I actually -- I'm trying to kind of think from a practical perspective. A teacher's behavior does implicate enforcement, regardless of who the defendant is, in five separate forums, and I think that's critical, because at its core it's that nature of the enforcement, regardless of who the defendant is, that creates this chill.

I want to kind of ground this case a little bit into the practical reality of what is occurring, and I know, your Honor, that either you're skeptical of hypotheticals -- I've been in cases before where you've told me that, and I'm well aware of that.

THE COURT: Well, no. Judges love to ask

hypotheticals. They don't like hypotheticals being put to them.

MR. BISSONNETTE: I know. I hear you. I hear you.

But I want to explain, actually, why hypotheticals matter, and actually in Santa Cruz and in Honeyfund the courts' posturing of questions was actually part of those courts' analyses in concluding that the statutes are ambiguous.

But why kind of this asking of questions is key, because these incidents come up in a million different factual circumstances in schools every day across the State of New Hampshire: Is this book covered, is that covered?

THE COURT: Do any of your clients -- are they seeking permission to expressly teach any of the banned concepts?

MR. BISSONNETTE: No. What they're asking, your Honor, is --

THE COURT: Their concern is that it will be interpreted broadly to potentially encompass legitimate conduct that they want to engage in and do engage in every day.

MR. BISSONNETTE: Yes.

THE COURT: I get that completely. I don't have any sense that any teacher wants to expressly advocate a banned concept. What I do get is they want to teach history, they want to teach the Civil Rights Movement, they want to teach about racism, they want to teach about sexism, they want to teach about implicit bias, the administrators want to do

sensitivity training. They want to do all those things without expressly advocating any banned concept, and if the statute made it absolutely clear that they could not be subject to discipline unless they expressly and intentionally engaged in teaching those concepts, we might have a very different case. The problem is the statute doesn't -- it allows people to be found liable even though they've acted unintentionally, and it, at least according to the Attorney General, allows people to be liable not because they say something, because they imply something.

MR. BISSONNETTE: Mm-hmm.

THE COURT: You combine those two things together, and it creates a problem. That's what I see is the --

MR. BISSONNETTE: I'm not going to disagree with you at all, but I do think the harm is a little bit greater than that.

There have been specific questions raised of the Department of Justice, the Department of Education, Hey, we got your guidance, and this is actually attached to the Mejia complaint, but we have specific questions, you know, in concrete terms, because this is the way the statute comes up in the classroom every day, you know? And let me just give you another example.

THE COURT: Give me an example.

MR. BISSONNETTE: Sure.

THE COURT: And then you construe the statute and tell me how the statute can be construed to prohibit that.

MR. BISSONNETTE: A complaint has been filed against the Exeter School District for their collaboration with the Racial Unity Team that is discussing issues like power, privilege, implicit bias, work that's central to school's work to help --

THE COURT: But give me an example of what they did.

MR. BISSONNETTE: One of the complaints that was raised, in addition to just the sheer fact that privilege is being discussed in schools, is that the book *To Kill a Mockingbird* was being taught with a focus on underrepresented characters. This is what we're --

THE COURT: Show me how that could be deemed to -- I know *To Kill a Mockingbird*. I thought you were going to bring a more contemporary example --

MR. BISSONNETTE: I have them, too, your Honor.

THE COURT: -- like *How to Be an Anti-Racist* and say, Okay, that's a subject of a violation.

But if you want to do *To Kill a Mockingbird*, show me how you could construe the statute to make the teaching of *To Kill a Mockingbird* unlawful under the banned concept statute.

MR. BISSONNETTE: It's not just the teaching of the book; it's how you talk about it, particularly if you talk about it in connection to contemporary events. Tom Robinson --

THE COURT: Show me how it could -- you're now charged with construing the statute.

MR. BISSONNETTE: Sure.

THE COURT: How could it be construed to make that conduct unlawful?

MR. BISSONNETTE: It could be construed that way because a complainant has basically said that it could be construed that way.

THE COURT: No. I'm sorry.

MR. BISSONNETTE: Sure.

THE COURT: We can't give statutory construction power to whatever citizen in the state, because there are people that have very unusual views about things. So that somebody thinks something violates a statute is not evidence that it violates a statute.

MR. BISSONNETTE: Can I challenge you on that just very briefly?

THE COURT: Yes.

MR. BISSONNETTE: I understand you feel strongly on that, your Honor, but one of the problems with the statute is that --

THE COURT: People who think -- the average person on the street does not have the power to give force to a construction. It's the governmental agencies that apply it and courts that interpret it that have that power. They don't have

any power, and they have strange views. I've had many unusual statutory construction views propounded, sometimes by lawyers, but they don't mean anything unless and until somebody adopts that construction. So, that's why I'm asking you --

MR. BISSONNETTE: No, I understand.

THE COURT: -- tell me how you would construe it to ban the teaching -- I can't see how somebody could ever say credibly it violates the statute to teach *To Kill a Mockingbird*.

MR. BISSONNETTE: It's not just -- again, your Honor, it's not just teaching it. We have to kind of, I think, get a little bit more granular, and I'll get to that, but just to kind of push back ever so slightly, the problem with the statute --

THE COURT: I have a vigorous, very explicit memory of sixth grade when *To Kill a Mockingbird* was taught in my class and we were discussing it together in class, so I actually remember from sixth grade that particular discussion. I just don't know, though, that -- I can't in any way see how it would have violated the statute.

MR. BISSONNETTE: The concern, though, your Honor, and why the perception of the public matter, and this is why I'm just slightly pushing back, is because it's not just the Department of Education, Department of Justice, the Human Rights Commission and Department of Labor that enforce it. It

is State courts that have an independent obligation to evaluate the text and hear complaints. So, this regime falls outside the enforcement authority of those that issue the guidance in this case; so the public perception, in my view, actually is really important because individuals essentially have the ability to bring private rights of action independent of any guidance that has been issued.

THE COURT: Yeah. I do think, though, again, I want to emphasize this, there's a tone in your briefs that this statute is very different from what it is. This is not a bounty statute. This is not a statute where the Legislature has purported to give standing to the average citizen to go after people that they think are violating the law. This statute does not do that. It allows aggrieved parties to sue. Aggrieved parties have a definition under the human rights statute, and they have a definition under standing law in Superior Court, and they do not entitle people to be bounty hunting.

So, to the extent you say that, I say back it up, because that's not what I understand the statute does. It does many things, but it doesn't do that.

MR. BISSONNETTE: Fair enough, your Honor. I think the only point that I was trying to make is that individuals have the ability to go to court outside the enforcement mechanisms that have been put forth by the State, which we may

disagree on that, but I actually think that's incredibly important in this particular case.

And I actually can present to you, again, if the Court is interested, the *To Kill a Mockingbird* reference, a complaint that actually has been filed, it was publicly put out on Twitter, and why I think this example has meaning. So, I'd be happy to present it to the Court.

THE COURT: Do you have any evidence yet of anyone being disciplined for violating the statute, anyone having been the subject of a successful Human Rights Commission case or a lawsuit for violating the statute? I haven't seen that, but it may exist. Do you have any of that?

MR. BISSONNETTE: So, we do know of, and it's very spotty, because I only have what's been voluntarily produced, I have examples of at least three complaints, including this one, that's not part of the record that I could present to the Court.

The Human Rights Commission has publicly represented that it hasn't docketed any complaints into, like, the active prosecutorial stage. But this is all the more reason, your Honor, why discovery is necessary in this particular case, particularly where an element or a factor of vagueness is the notion of enforcement. So, here I actually think the complaints are vital to learn about in discovery, because we get to learn, we should be able to learn, whether or not the

Human Rights Commission is interpreting the statute consistent with its own guidance. And we also --

THE COURT: I'm going to ask you to wrap up.

MR. BISSONNETTE: Sure.

THE COURT: And then I'm going to let Mr. Garland have a brief response, and then we'll take a break, come back and deal with the First Amendment argument.

I'm sorry to cut you off.

MR. BISSONNETTE: No, I understand. I've been talking for a while. I think we're fine your Honor. Thank you very much. I appreciate it.

THE COURT: Okay. Mr. Garland, briefly, and then we'll take a break.

MR. GARLAND: I'll be very brief, your Honor, and I'll speak from here, if that's okay. We believe we've put forth a construction that saves the statute from any facial vagueness challenge. You have indicated some reservations that appear to be reservations as a matter of statutory construction. To the extent you are uneasy with whether it's within -- either consistent with the statute to construe away the problem you've identified, or whether that would have any sort of binding effect and really resolve the problem, there is a clear solution short of discovery. I don't see what discovery does here.

New Hampshire Supreme Court can say what the statute

means; it can resolve any ambiguity. We put that as an alternative argument in our brief. I don't think it's necessary, in light of the arguments I've presented, but it exists as an option.

THE COURT: Okay. I appreciate that. Thank you for the good argument you guys have presented so far, and we'll take about a 15-minute break, come back, and we'll finish up with the First Amendment arguments.

THE CLERK: All rise.

(Recess taken from 2:43 p.m. to 3:02 p.m.)

THE CLERK: All rise for the Honorable Court. Please be seated. This hearing is back in session.

THE COURT: All right. Did you want to say something, sir?

MR. MOERDLER: Yes, your Honor. I think we were supposed to speak to the First Amendment claim.

THE COURT: Yeah. I was going to ask Mr. Garland to go first. He's the moving party.

MR. MOERDLER: Oh, I'm so sorry. I apologize.

THE COURT: No. I'm sorry if I wasn't clear. That's okay. As the moving party, I thought I would give him his shot and then hear your response.

So, Mr. Garland, what do you want to say?

MR. GARLAND: Thank you, your Honor. I think, just based upon the colloquy during the vagueness portion of this,

you understand our position. We think Garcetti sets forth the standard. We think that, as long as the speech is a speech that's being governed as speech pursuant to an official capacity, it is not subject to protection.

THE COURT: So, you know what the question is for you, right? The plaintiffs make no secret in their brief. Their brief is that this case's First Amendment claim is governed by the First Circuit's decision in Ward, Garcetti does not provide the controlling standard, Ward does, and under Ward they have a viable First Amendment claim.

Your argument is that Ward should not govern, that Garcetti has displaced it, and under the Garcetti framework, at least to the extent that the plaintiffs are seeking relief with respect to speech they undertake in their capacity as government employees, they have no First Amendment right, and the claim fails. That argument hinges on your contention that Ward doesn't provide the correct standard, Garcetti does.

So, tell me why Ward provides the correct standard.

MR. GARLAND: Ward doesn't, your Honor, is our position.

THE COURT: Ward doesn't. Excuse me.

MR. GARLAND: So, I think we set this forth in our reply, and I don't want to belabor it; I know we've been going on for a while. I understand that First Amendment precedent is usually binding on this Court almost always, especially on

related facts. We've had cases -- I've had cases before you where that issue has come up.

But older precedent or precedent that has been called into question can be displaced by subsequent developments, and Ward really did not address this threshold question. It assumed that the speech was protected to the extent that it occurred in a classroom, as did Pickering previously and really all of the other cases that predated Garcetti has set forth the balancing framework.

Garcetti came along and really was a sea change, in my view. It said, wait a second, there is a threshold question here; we do not get to balancing until you've answered that question.

THE COURT: So, the real issue, though, is I assume that the plaintiffs are going to say to me that teachers are different from other government employees; they have a measure of academic freedom, even when they are teaching their students; and that academic freedom, the extent to which Garcetti restricts academic free speech was left open expressly by the court in Garcetti, and so Ward remains good law.

What do you say to that?

MR. GARLAND: I have two responses to that, your Honor. The first is that I think most of the academic freedom discussion in Garcetti, if my memory serves me, was post-secondary, and this law doesn't reach that.

THE COURT: Well, I would say specifically the majority in Garcetti was responding to Justice Souter's comment. Justice Souter's comment was expressly limited to colleges and universities. Justice Souter did not in any way raise a concern about the application of Garcetti to secondary or elementary schools.

And so, one way to read this would be to say, at most, the Court left open the question of its applicability to colleges and universities in order to address what they identified as Justice Souter's concern. Right?

MR. GARLAND: I think that's right, your Honor. And I do think -- I'm not aware of anything that doesn't allow you to look at how other Courts of Appeals have considered this, and we've briefed it, and you've already identified Judge Sutton's Sixth Circuit opinion and Judge Easterbrook's Seventh Circuit opinion, and I don't have much more to add beyond the fact that those decisions, admittedly, are as-applied challenges but appear to support our position explicitly that Garcetti extends to teachers.

THE COURT: Yes, you've identified the Sixth and the Seventh Circuit I think most strongly and directly have taken this issue on and said that Garcetti does apply to elementary and secondary school teachers, and teachers in elementary and secondary school do not have a First Amendment right to teach something that is inconsistent with the curriculum; they have

to teach what's in the curriculum. They have no First Amendment right to teach something that they're not allowed to teach under the established curriculum. That's your view.

Okay. Let's assume that Ward applies. Even if Ward applies, the school board at the local level and the Department of Education at the statewide level have unlimited ability to impose any speech restriction that they choose on teaching as long as it serves a legitimate pedagogical purpose and the school gives notice before disciplining, right?

MR. GARLAND: Yes, your Honor.

THE COURT: Do you contend that this statute serves a legitimate pedagogical purpose?

MR. GARLAND: Yes, your Honor.

THE COURT: Okay. So, to the extent that it does and it's not vague, you would say that ends the First Amendment inquiry, even if Ward is the standard?

MR. GARLAND: That's precisely the argument we've made in reply. Yes, your Honor.

THE COURT: All right. So, that's your position: first, Ward doesn't apply at all; second, if Ward does apply, Ward gives only limited discretion to teachers, that is, only to teach -- they have to teach any restriction or any requirement, as long as it has a legitimate pedagogical purpose, which is a very low threshold, and there's notice. Here you say it's notice. If it's not vague, then you're

probably right; if it is vague, you're probably not right, and that's how you would dispose of that.

All right. Here's my question to you; this is something your opponent referenced with respect to the vagueness challenge: You know Garcetti only -- you know that government employees under Garcetti do not completely surrender their First Amendment rights, right?

MR. GARLAND: Yes, your Honor.

THE COURT: Okay. They retain First Amendment rights, although limited by Pickering, to the extent they are engaging in speech on a matter of public concern as a citizen, right?

MR. GARLAND: Yes, your Honor.

THE COURT: And the opposite of that is quintessentially government speech. To the extent they are instructed to engage in speech as a part of their government duties or to refrain from certain speech as a part of their government duties, you would say no First Amendment protection, but otherwise they do retain First Amendment protection.

To the extent this statute applies beyond the classroom and extends to other interactions that could be construed as teaching or advocacy directed at a pupil, that could implicate First Amendment behavior, even under Garcetti, couldn't it?

MR. GARLAND: It could, your Honor, sure. I accept the premise. I have a further response, though.

THE COURT: Okay. I'm interested in your response, but I wondered if you thought about the Supreme Court's decision in Bremmerton, which you're well aware of that recent case involving a high school principal that the Supreme Court said was allowed to engage in prayer at the 50-yard line after a game with students. And the Court there actually discussed the Garcetti standard in that case and said that that principal -- or excuse me -- that coach, even though he was on school property with his students that he was charged with coaching and engaging in prayer with them at the 50-yard line, that that was non-governmental speech that would be judged -- if it was a non-religious-type speech it would, therefore, be judged under the broader standard, not under Garcetti, right?

So, if that's true, then one could envision a great deal of speech that a teacher might engage in with a pupil outside of the teaching of the classroom that could be swept within the scope of this statute. Now, they seem to argue otherwise, but, to the extent that that's true, couldn't that preserve a First Amendment claim, at least a limited First Amendment claim, for teachers who might fear that -- say, for example -- I don't know.

Do schools have after-school clubs where teachers volunteer to supervise students? If they're supervising as a volunteer an after-school program, a chess club or something, and someone engages in a discussion with them about racial

issues and they are to make a statement about that, they would arguably have First Amendment rights on that issue, even under Garcetti; and, if that's true, that, even if you're right about the Garcetti framework, wouldn't that preserve a limited First Amendment claim at least at the 12(b)(6) level for teachers that are concerned that -- because, frankly, I think the plaintiffs' argument that teachers retain academic freedom to disregard the curriculum set by the school board, that's a very troubling proposition that I don't think finds much support in the case law. But, to the extent that teachers have First Amendment rights notwithstanding their role as teachers when they do things like the coach in the program in Bremmerton, that they might have First Amendment rights that would be curtailed if they were subject to discipline for advocating one of these banned concepts in a situation like that.

So, what's your response?

MR. GARLAND: Thank you, your Honor. I have a couple of responses to that specific question.

First off, I think what you're getting at is the concept of an overbreadth challenge, and that's how I understand this First Amendment challenge, too. But the plaintiffs here are bringing a facial claim, and the standard for a facial overbreadth challenge requires both that the text of the statute sweep in, as you say, protected speech and that actual fact demonstrate it at the pleading stage; presumably

that's the allegations in the complaint.

I would think the text of the statute contemplates the circumstances that they are reaching here, that the text really does tether the proscription to things folks are doing in their official capacities. It does so I think explicitly -- the language in our guidance I think further clarifies that. I think reading it in conjunction with RSA 98-E as a matter of State statutory construction further confirms it, because 98-E protects in a similar manner.

THE COURT: 98-E specifically gives government employees, recognizes the right that they have to speech notwithstanding the fact that they are government employees. I agree with you on that.

MR. GARLAND: Exactly, your Honor. And so, I think as a matter of how this statute must be construed as a matter of statutory construction, it does not on its face extend to speech that would be protected by the First Amendment.

THE COURT: Maybe the plaintiff agrees with you. I thought he was making that argument. I'm not inclined to agree with that. I think the statute seems to prohibit any advocacy directed at a pupil, and so I think it sweeps broadly enough to encompass that, or at least that's my concern.

Now, do you have a different reading of the statute?

MR. GARLAND: I do, your Honor. Forgive me. I just want to run back to my desk.

THE COURT: Sure.

MR. GARLAND: So, your Honor, my reading is, once again, consistent with the FAQs, and I don't want to read too much into the record here, but the statute reaches conduct of people who work to administer programs on behalf of the State of New Hampshire, including teachers in an educational setting. I think as a matter of facial construction that only reaches a governmental speech under the Garcetti framework. I would point the Court to --

THE COURT: Yeah, but let's focus on the -- I don't have it in front of me now, I have so many papers, but the actual statute itself is directed at pupils, right? And it says, Pupils shall not be, and it's phrased in that kind of confusing way. I mean, it's not the ideal way to write a statute, but it says, No pupil shall be, and taught is one of the things. But it goes quite beyond taught." It includes more advocacy. And it doesn't say "in the classroom" or anything like that, "in school," which could be a club, after-school club for which a teacher is doing work, or in lower grades, if a teacher stays on in an after-school program and supervises the kids while they're on the playground waiting for parents to come and pick them up or something. Those are activities that, arguably, are not governmental speech. The employer, the school district is not dictating what they may say and not say, except to the extent they impose these banned

concepts on them, and they would retain some First Amendment rights.

So, my concern is I think, to the extent the plaintiffs assert that there is this First Amendment right to academic freedom for elementary and secondary school teachers, I have trouble squaring that with many cases, but, to the extent that they are saying, We're afraid even when we're not teaching the curriculum that we're subject to the statute and could be disciplined for engaging in conduct that we have a First Amendment right, it would require a Pickering balance test. Do you know what I mean?

Because this statute, if it were applied privately, if, like, the Legislature adopted it and said, No person shall, it would be unconstitutional in a second, because it's a viewpoint-based discrimination that can't be -- speech restriction that can't be justified and is not narrowly tailored.

But what Pickering says is governmental employees who engage in speech, even if they're not engaged in government speech, they have First Amendment rights, but they're not the same as everybody else's; they're subject to balancing in a different way.

So, that's my concern, is, is there that space left for a First Amendment claim, even if I am persuaded by your contention that under Garcetti the core curricular teaching

that's done has to be done the way the school tells the teacher to do it; they're not like university professors that arguably have academic freedom that gives them greater First Amendment protection.

Are the plaintiffs really advocating that teachers can disregard the instructions on curriculum from the school board? That somehow seems wrong to me.

MR. GARLAND: Your point is well taken, your Honor. My response to that, again, is, as a matter of construction, which does require I think that this Court look to 98-E, it shouldn't preserve that sphere. It really couldn't without conflicting, I think, with the speech protections that exist under State law.

I point the Court to, and this isn't cited in our brief, and I apologize for that, but United States versus National Treasury Employees Union. It's 513 U.S. 454. I'm going to characterize it. I know you're going to read it. But all nine justices in that case have dealt with honoraria for federal employees, and it was blanket ban on them. All nine justices in that case appeared to contemplate that, if there were a sufficient nexus between the ban and the governmental -- the role as a governmental employee, that would survive a facial challenge. It was really a dispute in that case between whether this ban could be saved because insofar as, you know, could the private speech be severed from the public speech.

Justice O'Connor thought it could, five-justice majority thought it couldn't, and then the three justices then took a slightly different view and thought the whole thing survived.

But the point being that there is a pretty long dialogue in that case about if a statute is connecting the proscriptive conduct to governmental activity that's probably okay, and I think that's reflected as well both in Honeyfund and in Santa Cruz, where -- in Honeyfund, at least, it's really just a footnote. The footnote says, There's no dispute this reaches private speech, so we're not going to get into that.

But in Santa Cruz Judge Freeman made the point that, if this were limited to contract --

THE COURT: Slow down.

MR. GARLAND: I apologize. If that case were limited just to contractors doing work pursuant to their federal contracts, it would be a different case. Her concern was what they're doing in private and it extending to private trainings given by contractors unrelated to it. The same view with grantees there. And I do think those cases support the notion that, at least as a facial matter, if as a matter of statutory construction the statute is tethered just to the sort of speech that Garcetti would say isn't protected by First Amendment, the facial challenge fails. There may well be an as-applied challenge if the concern that you have addressed comes to pass.

And I would note that I haven't been able to find any

facial challenge, at least at a U.S. Court of Appeals level, I don't want to make a representation for District Courts, post Garcetti that allowed a case to go forward based on the sort of overbreadth theory that you've identified. Every challenge I've found has been an as-applied challenge. Bremmerton was an as-applied challenge. The Sixth Circuit and Seventh Circuit cases were as-applied challenges, too.

So, our position is as a matter of statutory construction this does not sweep in enough protected conduct, we don't think it sweeps in any, that it wouldn't be remedied through that sort of challenge if it were misapplied, is our position. Thank you.

THE COURT: Okay. Good. Anything else?

MR. GARLAND: That's all, your Honor.

THE COURT: Okay. Thank you. I'll hear plaintiffs on the First Amendment issue.

MR. MOERDLER: Your Honor, I have taken perhaps much, too much time, but I would ask you to indulge me for a few moments.

THE COURT: I will. It's an important issue. I'll hear you.

MR. MOERDLER: And let me make very clear I doubt that there was a single statement you just made that I would disagree with, and yet I would say to you that First Amendment protections are very much here.

Let me tell you why we pled a First Amendment claim. The Supreme Court of the United States in three cases has said, in words or substance that I'll give the Court in a moment, the Court has said that the standard for First Amendment challenges is more exacting where a void for vagueness challenge, not determination, void for vagueness challenge is presented, thereby suggesting to those on the FCC against Fox case and also Baggett against Bullitt and Grayned, all three of those Supreme Court cases.

Now that can be interpreted many, many ways. One way in which it is interpreted is the two interact, and you nailed me on that in my main presentation when I talked about 189:11, because what that does, it says to you the following: I am applying Garcetti because you are required to teach the subject, but I'm not going to let you get off the hook on that, because you're barred from doing it under this statute.

Put vagueness aside. How do I know what speech is chilled here?

Now, that isn't a total answer, and it cannot be until there is discovery, which is what we said right from the get-go, and that is exactly the point. We reserved the right to make an as-applied challenge depending on discovery. If there isn't a discovery here that shows it's there, I cannot under Rule 11 allege it any further, but very clearly the indicators are there, as I showed you in one of the documents

that was an exhibit.

Let me go a couple of steps further, if I may. You pointed out, quite correctly, and, as I said, I agree with substantially everything you said to my adversary, that we seem to argue otherwise from what the Court does. We don't.

THE COURT: Maybe you can help me with this, because this is the struggle I have: I read the case law, including Ward, including Griswold, a number of other cases from outside the Circuit that draw a distinction for First Amendment purposes, academic freedom purposes between school teachers in the elementary and secondary schools and college professors, and that the concern that Justice Souter was expressing in Garcetti, which I think is a very well-taken concern, that if you simply say if you're engaging in government speech for your employer, say at the University of New Hampshire, that you have no First Amendment protection right would be very problematic in a college or university setting.

On the other hand, it seems to me quite problematic to suggest that that academic freedom extends in the same way to a high school teacher, and I don't find support in the case law for that. But what I do find support for is that they don't lose their First Amendment rights entirely. They can't teach something the school says they can't teach as long as the school tells them clearly what it is they can't teach, but they outside of the school might have -- outside of the classroom

doing their teaching duties might have a number of interactions with pupils for which they could retain some residuum of First Amendment protection.

So, I'm drawing that distinction. If you think it's a bad one, tell me --

MR. MOERDLER: No, I don't.

THE COURT: -- between curriculum control --

MR. MOERDLER: I don't think it's a bad one.

THE COURT: -- and speech outside of the curriculum. You think that's a legitimate way to --

MR. MOERDLER: I do not think it's a bad one.

THE COURT: Okay.

MR. MOERDLER: I suggest to you, however, the following, and it is one that the case law has tended to go, but I think it's the wrong test for the case law, and I believe this case shows me why.

I keep coming back to 189, because there is a lengthy dissertation by the Department of Education, which is also part of the record, as to what you're allowed to teach and supposed to teach. You're supposed to teach genocide. That's superiority. Take a look at Russia. Can I teach the pupil by saying that the Ukrainians were not of the match to the Russians, that there's superiority there? I'm required to teach it.

I think what you get to is a principle which I can't

fully articulate but I will point to. It's a waiver principle. It's a principle that when government tells you to do it, it's waived the protections of Garcetti, number one.

Number two, I have to take you back to one of my very favorite quotes and why I have this case. It's by Frankfurter and John Marshall Harlan in Sweezy against New Hampshire. It is as follows:

I say that in these matters of the spirit inroads on legitimacy must be resisted at their incipiency. This kind of evil grows by what it is allowed to feed on. The admonition of the Court in another context is applicable here. It may be that it is the least of the obnoxious thing in its mildest and least repulsive form; but the illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from the legal modes of procedure.

Now, I say to you that this is an as-applied case because I believe that when we get into it, just based on the statements of the legislators who introduced it, and based on Edelblut's statement, based on those you're going to see that. You're going to see partisan that's already been shown.

What about Pico, which specifically says in the Supreme Court that if it is --

THE COURT: Pico is a very important case, as you know, a plurality decision --

MR. MOERDLER: Right.

THE COURT: -- that dealt with a very specific and a highly First Amendment-ly sensitive issue of removal of books from a school library, and I think Justice Souter's decision, when writing for the Circuit in Griswold, made a very big distinction. He specifically talks about should a curriculum decision be subject to the Pico review, or should it be subject to our decisions about curricular control and concluded it isn't a Pico case.

So I'm, frankly, reluctant to take that case, which deals with a very important concept of library and what can be removed from a library, and say, no, that wouldn't necessarily apply in our case.

MR. MOERDLER: I understand that, and I fully would join in it if it were not, again, for the same fact, how do you tell me what the curriculum is, when as recently as a few months ago you're told to do it?

THE COURT: Okay. So, I think you have done a good job of sensitizing me and to make me very carefully look at your claim in your second count and maybe insofar as it relates to your First Amendment claim as well, this argument that you've expounded on in different ways that there are requirements to teach X and prohibitions on teaching Y, and, when you look at the two together, they leave a teacher with an impossible burden. That's your point?

MR. MOERDLER: Yes, and I leave it there.

THE COURT: And lend support to vagueness and First Amendment. I hear you on that. I'll study it carefully before I make any decision on the issue.

MR. MOERDLER: I have one more point, two more points, if I may.

THE COURT: Go ahead.

MR. MOERDLER: The first is, there is in the guidance an explicit statement under Guidance Number 8 issued in the name of the Department of Education and Human Rights and Justice, which specifically says extracurricular activities are part of the public school's work.

Now, that plays into the following question. Let's take Bremmerton a different way. What is the difference if that coach -- it's a high school football game. What is the difference if that coach assembles the kids in the break in between the first and the second half and teaches religion, pointing out, as the Supreme Court did, that freedom of speech is in precisely the same provision of the *Constitution* as freedom of religion? And what if he wears a T-shirt that says, Ukraine is right? What is the difference between --

THE COURT: I think maybe a more applicable problem is, say, while the Black Lives Matter protests are going on, and before that, when a professional football player is criticized for kneeling at the *National Anthem* and a coach who

has a multi-racial staff of students is approached by students after practice and say, We need to -- want to talk about this. And, now, the coach may not be an educator under the standard, but a lot of coaches are educators under the standard. If he's an educator under the standard and talks to pupils in ways that could be -- that might not be governmental speech to which the coach has no First Amendment right, and to the extent they retain a First Amendment right it requires a balancing under the more First Amendment protective standard that preceded Garcetti, and under that, you know, combine that with the vagueness argument you have, and you have a potential First Amendment overbreadth argument.

MR. MOERDLER: Exactly.

THE COURT: I think you've made that point well.

MR. MOERDLER: That is my point, and I add one last -- two words.

THE COURT: Okay.

MR. MOERDLER: Prior restraint. Now, you add that to the mix, and where are you? You are in a situation, with respect, your Honor, you are in a situation where you have State action in the 189, you have specific counseling in the FAQs that this is barred, you have a prior restraint, you have no idea what is and isn't covered, and you have a prior restraint that you can be brought up on charges right then and there. How do you do that?

THE COURT: Okay. All right. I hear you on that, although the words "prior restraint" do not appear in any of the briefs that I've read.

MR. MOERDLER: Your Honor, you are absolutely right. I must confess to you that it is something I did in the preparation of this argument.

THE COURT: All right. Well, I appreciate it.

So, let me just make clear to you, I have a very large workload burden at the moment, and I'm trying to finish several other very significant cases. I don't expect I'll have a decision for you until at least 60 days. It won't be longer than 90, but it will probably be about 60 days.

If the case survives the motion, then I will convene a pretrial conference, and we can discuss the scope of any discovery. If the case, obviously, does not survive, then I'll issue the order, the case will end, and appeal rights can be preserved. But as soon as I can get to a decision I'll issue it, and then, if the case survives, we'll meet and talk about the scope of discovery.

MR. MOERDLER: Your Honor, I have no wish to give offense in what I am about to say to anyone, least of all Mr. Garland and his office. I do hope that they and the Department of Education and the other agencies have in mind the preservation of all documents during that period.

THE COURT: Well, you can send a preservation letter

to him. He's probably done something already.

What do you want to say?

MR. GARLAND: As a matter of course, your Honor, we send document preservation notices. I have no reason to believe that one wasn't sent, but I will confirm when I get back.

MR. MOERDLER: Oh, that's fine. Thank you.

THE COURT: Okay, good.

I did not give the other side -- you're not raising a First Amendment issue, but if you wanted to add anything, I'll let you do it.

MR. BISSONNETTE: My only addition, your Honor, is not on the First Amendment claim, is to say, to the extent that this claim survives, we probably will be seeking expedited discovery. We have the school year underway here. There's a lot of anxiety.

THE COURT: Yeah. I think, to the extent it survives, now, I want to be -- I think we could envision an expedited discovery regime but also a tightly focused discovery regime. This is not a case where we need 200 depositions and 3 million documents. We can be targeted, and we can be expedited, and we can be focused, and we can get the discovery done in a matter of months, and we can get cross-motions for summary judgment, which is where these cases ordinarily sort out if they don't end up in a dismissal at the 12(b)(6) stage. So, that would be

my intention: fast, efficient, fair, narrow, get us to summary judgment and then get a ruling one way or the other, if the case survives the 12(b)(6) issue.

Okay. All right. I appreciate the good quality of argument. Thank you for your help.

THE CLERK: All rise.

(WHEREUPON, the proceedings adjourned at 3:37 p.m.)

C E R T I F I C A T E

I, Brenda K. Hancock, RMR, CRR and Official Court Reporter of the United States District Court, do hereby certify that the foregoing transcript constitutes, to the best of my skill and ability, a true and accurate transcription of the within proceedings.

Date: 10/17/22

/s/ *Brenda K. Hancock*
Brenda K. Hancock, RMR, CRR
Official Court Reporter